Investigative Hearings (Re: Application under Criminal Code s. 83.28)

BACKGROUND

- The *Anti-terrorism Act*, adopted in December 2001, created new terrorism-related offences and new police powers to investigate those offences. A new power - investigative hearings – was set out in section 83.28 of the *Criminal Code* (see separate note). A peace officer may apply to a judge for an order that a person attend at a specified location and be examined before a presiding judge regarding information about a terrorism offence. The person subject to the order may also be required to produce things in their possession relevant to the investigation. In May 2003, the Air India trial prosecutors (*R. v. Malik and Bagri*) obtained a s. 83.28 order, permitting the Crown to examine a potential Crown witness who was not an accused or a suspect in the Air India bombing. A condition of the order was that the hearing be conducted in *camera* and without notice to the accused, the press or the public. The named person challenged the constitutionality of section 83.28, arguing that it violated the right to silence and that the involvement of a judge in the hearing compromised the independence of the judiciary. A court order upholding the constitutionality of the investigative hearing was appealed to the Supreme Court of Canada.

- The CBA intervened at the SCC. Greg DelBigio of Vancouver acted as *pro bono* counsel. It argued that section 83.28 upsets the balance between powers of the police and the rights and liberties of individuals within Canada, by permitting an unwarranted intrusion upon liberty, privacy, solicitor-client privilege and judicial independence that cannot be justified in Canadian democracy. The CBA argued that section 83.28 operates in contrast to the well-established principle that "a witness has no legal obligation to assist the police in their investigation".

- In its June 2004 decision, the SCC cautiously upheld the validity of section 83.28, recognizing that terrorism offences are distinguished from other criminal activity in method, purpose and magnitude, and may therefore demand a different legislative response. However, the court carefully limited the outcome to the specific facts before it.

- In February 2007, the House of Commons defeated a motion to extend the preventive arrest and investigative hearing provisions for another three years past the statutory sunset.

- In October 2007, Bill S-3 proposed reintroducing preventive arrest and investigative hearings into the *Criminal Code*. The Criminal Justice Section presented a brief to the Senate Committee on Legal and Constitutional Affairs in February 2008. The Section said that the Bill provides inadequate restrictions over what happens to property after it is ordered to be brought to an investigative hearing. It repeated concerns about the marked departure from traditional powers to investigate criminal offences by compelling assistance with an investigation, and recommended the application to require attendance at an investigative hearing be made under oath. The Section suggested that the Bill specifically allow legal representation by counsel during the hearing, and allow the presiding judge the power to appoint counsel. The Bill was passed in the Senate but died on the Order Paper with the September 2008 election call.

- Bill S-3 was reintroduced as Bill C-19 in March 2009. The Criminal Justice Section responded by highlighting the May 2009 Eminent Jurists' Panel report. The Panel cautioned against many countries' measures to address extraordinary times becoming increasingly ordinary and anti-terrorism measures creeping into domestic criminal law without regard for due process and human rights. Bill C-19 died on the Order Paper and was reintroduced in April 2010 as Bill C-17. Section commented on Bill C-17 in March 2011. The Bill died on the Order Paper.

- Bill S-7, introduced in February 2012, creates additional *Criminal Code* offences of leaving or attempting to leave Canada to commit certain terrorism offences, and other provisions. The Section

appeared at the House of Commons Public Safety and National Security Committee in December 2012. Bill received Royal Assent in April 2013 (S.C. 2013, c.9).

- The CBA responded to Bill C-51, *Anti-terrorism Act, 2015* in spring 2015, with input from several CBA Sections. In March 2015, CBA appeared before the House Public Safety Committee and the Senate National Security Committee, represented by Eric Gottardi (Criminal Justice Section) and Peter Edelmann (Immigration Law Section). The House Committee reported the Bill with a few amendments that did not address the bulk of CBA's concerns. The CBA's concerns were also not addressed by the Senate's observations about the Bill. Bill C-51 received Royal Assent in June 2015 (S.C.2015, c.20).
- In fall 2015, the government undertook to "Work to repeal the problematic elements of Bill C-51 and introduce new legislation that strengthens accountability with respect to national security and better balances collective security with rights and freedoms."
- The Senate National Security and Defence Committee also studied security threats facing Canada.
- In June 2016, Bills C-21, 22 and 23 were introduced to address various national security issues (*Customs Act* amendments to allow Canada Border Services Agency to collect personal information on prescribed people leaving or who have left Canada, creating a new National Security and Intelligence Committee of Parliamentarians and changes to the *Preclearance Act*, respectively).
- In September 2016, Public Safety Minister Ralph Goodale released a green paper on national security and held stakeholder consultations.
- The CBA's Anti-Terrorism/National Security working group, composed of several Sections, responded to the proposed legislation in fall 2016 and spring 2017, and to the government's consultation on the national security green paper in December 2016.

CURRENT STATUS

- In June 2017, Bill C-59, *National Security Act 2017* was introduced. The Bill proposes a *National Security and Intelligence Review Agency Act*, *Intelligence Commissioner Act*, and *Communications Security Establishment Act*, and would amend several parts of the previous Bill C-51. It also proposes a six-year comprehensive review of the Bill. The working group sees Bill C-59 as addressing many CBA concerns about Bill C-51, though some remain. The CBA appeared before the House Public Safety Committee in February 2018. The working group considered changes made to the Bill by the House but did not present to the Senate Committee. In May 2019, the Senate made further changes that were sent back to the House, but remaining CBA concerns were largely not addressed. The Bill received Royal Assent in June 2019 (S.C. 2019, c.13).

NEXT STEPS

- The Sections will continue to monitor and respond to other legislation and consultations to express CBA priorities in this area.